



April 11, 2012

BY HAND DELIVERY AND ELECTRONIC FILING

Marlene H. Dortch
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Ex Parte Communication

Satellite Broadcasting & Communications Association, Petition for Declaratory Ruling Regarding Application of the Over-the-Air Reception Devices Rule to Certain Provisions of the Philadelphia, Pennsylvania Code, CSR-8541-O

Dear Ms. Dortch:

On April 5, 2012, counsel for the City of Philadelphia submitted a letter in this proceeding, directing the Commission's attention to certain educational materials placed online by the Satellite Broadcasting & Communications Association ("SBCA"), which he recently discovered.¹ These materials, according to Philadelphia, "effectively incorporate the City's own placement preference,"² thus allegedly proving the reasonableness (and therefore legality) of Philadelphia's approach under the Commission's OTARD rules.

On its face, Philadelphia's letter does *not* address the unreasonableness and illegality of those parts of its Ordinance; instead it addresses issues other than antenna placement, such as those requiring registration of previously installed antennas, removal of unused antennas, and painting of dishes. Moreover, even on the limited grounds it purports to address, the letter has nothing to offer the Commission.

- It is misleading. Its description of the Philadelphia Ordinance directly contradicts both the Ordinance's text and Philadelphia's own prior advocacy. This mischaracterization is not trivial; it goes to the very heart of Philadelphia's argument.

¹ Letter from James R. Hobson to Marlene Dortch at 2 (filed Apr. 5, 2012) ("Philadelphia Letter"). Unless otherwise indicated, all documents cited in this letter were filed in CSR-8541-O.

² *Id.* at 2.

- It is irrelevant. The mere fact that SBCA has chosen to advise installers to consider using certain practices voluntarily has nothing whatsoever to do with whether a city can require installers to comply with such practices under the penalty of law.
- It is wrong. Even if SBCA's materials were more than advisory, they do not "incorporate" Philadelphia's approach, which is far more onerous.

Setting even this aside, Philadelphia's letter is deeply disappointing for another reason. One would have thought that Philadelphia would be thrilled with an industry-based effort to address the concerns it has raised. Certainly, had SBCA advised installers to ignore placement issues completely, Philadelphia would be first in line to complain. Yet the city has nonetheless attempted to characterize SBCA's informal advice on antenna placement considerations as a form of admission to the legality of regulations imposed in the same area. It is hard to imagine a better way to discourage cooperation between the satellite industry and cities in addressing alleged aesthetic concerns.

I. Philadelphia's Letter Is Misleading

Philadelphia's basic argument is that SBCA's educational materials demonstrate the "reasonableness" of Philadelphia's own antenna placement preference. Before addressing this argument, however, Petitioners are compelled to observe the misleading way in which Philadelphia describes the relevant statutory language:

*As discussed by both sides, the City's ordinance permits dish installation on the street-side façade of a building provided that no alternative location is available that does not "impair" the installation . . . within the special meaning the OTARD rule attaches to that term. Installers are required to consider whether such alternative locations are available without "impairment," and if none is available, to provide a written statement to that effect, after which they are free to install on a street façade.*³

"Both sides" have discussed no such thing. In fact, "both sides" acknowledge that Philadelphia's Ordinance works very differently than this.

The excerpt above describes only one provision of Philadelphia's new antenna placement rules—the provision governing single-family homes. Multi-family dwellings are governed by an entirely different provision.⁴ As Philadelphia described the multi-family rule, it "requires a placement other than the streetfront façade of the building as long as any alternative location is available—even if such location would require some

³ *Id.* at 1 (emphasis added).

⁴ Subcode PM, Ch. 3, §§ PM-304.3.1(b); *see also* Title 9, Ch. 9-600, Sec. 9-632.

material delay or additional material expense for the antenna location.”⁵ In other words, for multi-family dwellings,⁶ Philadelphia requires non-façade placement regardless of impairment. So long as any alternative location exists, and regardless of costs and delay, installers are *not* “free to install on a street façade.”

This is no mere oversight, nor is it a poor choice of words. The only point of Philadelphia’s letter is to claim that its antenna placement rules impose costs that are “reasonable” and thus permissible under OTARD. But for installation in multi-family dwellings (which are the more common type of dwelling in Philadelphia and the principle area of concern for Philadelphia’s City Council), the Ordinance requires alternate placement *regardless of cost or delay*. For Philadelphia to ignore this—much less to flatly state otherwise—is astonishing.

II. Philadelphia’s Letter is Irrelevant to the Arguments at Issue Here

Philadelphia argues that SBCA’s educational materials “effectively incorporate the City’s own placement preference.”⁷ These materials, however, incorporate no such thing. They are an attempt by an industry organization to address the concerns of cities like Philadelphia by elaborating a series of antenna placement guidelines and a corresponding certification for installers. The content of this guidance is entirely irrelevant to the legality of Philadelphia’s Ordinance.

SBCA’s educational materials make *recommendations*. Compliance is entirely within the discretion of the installer, none of whom are hired, fired, or engaged by SBCA, and the quality of whose work is not guaranteed by SBCA.⁸ This alone establishes their reasonableness as a matter of law. If an installer determines that following the recommendations would unreasonably increase costs, unreasonably delay installation, or

⁵ Comments of the City of Philadelphia at 9 (filed Dec. 22) (“Philadelphia Comments”) (describing Subcode PM, Ch. 3, §§ PM-304.3.1(c)).

⁶ The City has asserted without explanation that townhomes, condominiums, units in planned communities, and row houses all would be governed by the single-family dwelling ordinance, rather than the ordinance governing multi-family or two-family dwellings. Philadelphia Comments at 24. The definition of single-family dwelling in the Code appears to exclude any dwelling containing two separate units “providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.” See Subcode PM, Ch. 2 §PM-202.0 General Definitions (“Dwelling unit: A single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation, including such units contained within residential condominiums.”). By its terms, this definition would exclude the large number of townhomes and row houses which contain separate apartments that are rented out by an owner residing on the main floor.

⁷ Philadelphia Letter at 2.

⁸ SBCA National Standards and Testing Program Slide 1-2, attached hereto as Exhibit A.

preclude reception, she is free to ignore them. By contrast, installers ignore the Philadelphia Ordinance at their own legal peril.

Moreover, SBCA can change this guidance at any time. If, for example, it comes to learn that particular guidance unreasonably increases costs or delays installation, it can modify or delete that guidance. SBCA has no similar ability to influence Philadelphia's Ordinance or its enforcement.

Nor should Philadelphia be heard to suggest that SBCA "acknowledges the legitimacy" of aesthetic concerns for purposes of this complaint.⁹ Of course SBCA can justify its industry guidance on grounds that are impermissible under OTARD, if it so wishes. Here, SBCA developed its guidance in part "to reduce the need for government intervention."¹⁰ It should be no surprise that such a course addresses cities' stated concerns about aesthetics. This does not mean, however, that cities' aesthetic concerns are a legitimate basis for regulation. Nor does it mean that they can be read into a Congressional preemption regime that was designed precisely to *prevent* cities from making such judgments.

Even if the SBCA educational materials copied Philadelphia's Ordinance word-for-word—and they do not—the two approaches would still serve different purposes, operate in different ways, and have different consequences for installers and customers. Suggesting that the two approaches are parallel, much less that one "incorporates" the other, is just wrong.

III. Philadelphia's Legal Argument is Meritless

Setting aside the mischaracterizations in Philadelphia's letter, and even ignoring the myriad differences between a city ordinance and private guidance, Philadelphia's principal claim—that SBCA's recommendations demonstrate the reasonableness of Philadelphia's approach—is incorrect. Both documents contain placement preferences, but Philadelphia's are far more onerous.

The SBCA educational materials recommend that installers check areas other than the front of the dwelling first, and place the antenna in such areas where possible. Thus, those materials counsel installers as follows:

As responsible members of the community citizens [sic] we must keep aesthetics in mind[.] Therefore it is imperative *to consider* the following:

- *Attempt* to mount dish in an unobtrusive location, *preferably* not on front of structure

⁹ Philadelphia Letter at 2.

¹⁰ SBCA National Standards and Testing Program Slide 1-8, attached hereto as Exhibit A.

- Ensure proper signal strength
- Adhere to all safety requirements
- Inform customer of *any additional costs* for custom mounting
- Verify appropriate access for siting – *consider whether or not* you can gain access to an area such as a roof.¹¹

The materials continue:

Test for signal strength in locations away from the front of the property facing the street. If you are assured of adequate signal strength and the dish can be mounted safely at a location other than the front, then place this dish at that location. *If the signal strength is inadequate, or there is a safety risk associated with a mount at a location other than the front of the building*, then mount the dish on the front of the building.¹²

These recommendations do not place unreasonable demands on installers. Installers are asked to “consider” installation other than the streetfront façade. Where they cannot do so “safely,” or where there is not an adequate signal, installers can “mount the dish on the front of the building.” Installers can also do so where the customer does not wish to incur “*any additional costs for custom mounting*”¹³—a provision that, by itself, goes a long way towards incorporating OTARD’s language concerning costs and delays.

Philadelphia’s ordinance is very different. As discussed above, for multi-family dwellings, Philadelphia’s Ordinance requires alternate placement regardless of cost or delay. Even for single-family homes, Philadelphia’s Ordinance requires alternate placement unless such placement causes “material” costs or delays—a term Petitioners have already demonstrated to be more onerous than permitted by OTARD. Philadelphia’s approach would thus impose upon customers any “additional costs for custom installation,” while SBCA’s materials allow the customer to choose whether to incur such additional costs.

Philadelphia’s ordinance also requires “actual testing” before certifying that alternative locations are not available or would be costly. SBCA’s materials refer simply

¹¹ *Id.* at Slide 1-13 (copy appended to Philadelphia letter) (emphasis added).

¹² *Id.* at Slide 1-14 (copy appended to Philadelphia letter) (emphasis added).

¹³ The SBCA educational materials suggest that installers notify customers of such costs. Nowhere do they suggest that customers must be required to undergo the expense of custom installations.

to “test[ing] for signal strength,” a term that includes simple line-of-sight testing (*i.e.*, the sort of testing installers now use to determine whether potential subscribers can receive satellite signals at all). Under the Ordinance, however, Philadelphia can require installers to physically mount a dish in various locations and engage in signal testing using equipment similar to that used for distant signal eligibility. They also can require the installer to certify that she has literally tested every square foot of the subscriber’s property to ensure that no placement acceptable to the city is available. That kind of “testing” is very different than that contemplated by the educational materials.

Accordingly, even if one accepts Philadelphia’s premise that SBCA’s materials are relevant to the legality of the Ordinance, the two approaches simply are not the same. SBCA’s educational materials do not demonstrate the reasonableness of Philadelphia’s mandate.

* * *

Philadelphia’s discussion of SBCA’s educational materials adds nothing to this proceeding, and its decision to make an issue of them in the first place is regrettable. Petitioners urge the Commission to swiftly declare Philadelphia’s Ordinance to be preempted by federal law.

Ms. Marlene H. Dortch

April 11, 2012

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Respectfully submitted,

/s/

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Exhibit A



The SBCA National Standards and Testing Program certifies that installers have passed standardized testing developed by the SBCA and industry leaders. The SBCA does not guarantee the quality of nor assume any liability for the work performed by the certified installer.

1-2



Why is this Course Necessary

- To guarantee that individuals have core knowledge of a small satellite dish installation
- Establish standards for the industry to reduce the need for government intervention
- Maintain high customer satisfaction and retention

Note: Research shows that 44% of all installations are referrals from existing customers



Detailed Installer Responsibilities

Customers require an adequate signal strength to enjoy the full benefit of our services and as responsible members of the community citizens we must keep aesthetics in mind

Therefore it is *imperative* to consider the following:

- Attempt to mount dish in an unobtrusive location, preferably not on front of structure
- Ensure proper signal strength
- Adhere to all safety requirements
- Inform customer of any additional costs for custom mounting
- Verify appropriate access for siting - consider whether or not you can gain access to an area such as a roof

1-13



Detailed Installer Responsibilities

Rule to Follow:

Test for signal strength in locations away from the front of the property facing the street. If you are assured of adequate signal strength and the dish can be mounted safely at a location other than the front, then place this dish at that location. If the signal strength is inadequate, or there is a safety risk associated with a mount at a location other than the front of the building, then mount the dish on the front of the building.